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No. 82-710

In the
Supreme Court of the United States.

OCTOBER TERM, 1982.

MARION KAPLAN,
PETITIONER,

v.

SAMUEL W. BLACK,
RESPONDENT.

Respondent's Brief in Opposition to Petitioner's Request for a Review on Writ of Certiorari to the United States Court of Appeals for the First Circuit.

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Question Presented for Review.

Whether the petition for writ of certiorari should be denied based upon the fact that the decision by the United States Court of Appeals for the First Circuit affirming the determination of the United States District Court justice in allowing Samuel W. Black's motion to dismiss was appropriate.

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Statement of the Case.

Rose Black, mother of both Marion and Samuel, was married to Joseph Black, who passed away in 1956. There was a dispute among the heirs of the estate which was ultimately settled in 1957. This dispute fostered considerable sibling acrimony.

In 1958, Rose constructed a three-room addition to her home in Malden and allowed Marion and her family to live in her home at 18 Pierce Street, rent-free, while Rose lived in the

three-room addition. Marion agreed to remain at the home with her mother until Rose's death.

In 1966, Rose executed a will in which she purported to leave the properties at 4 Newbury Street, West Peabody, Massachusetts, 1078 Main Street, Reading, Massachusetts, and 18 Pierce Street, Malden, Massachusetts, to her daughter Marion.

On July 14, 1976, Rose executed deeds for these three parcels to her son Samuel, and delivered these deeds to him. Samuel recorded these deeds in the appropriate registries of deeds.

On November 4, 1976, Rose entered an action in the superior court, *Black* v. *Black*, 376 Mass. 929, 381 N.E.2d 1304 (1978), seeking to rescind the execution of these deeds on the basis of an alleged fraud and undue influence exercised by Samuel on Rose while she was in a weak and infirm condition.

All issues that were in the initial action, including fraud, undue influence and mental incompetency were tried before a jury on October 6 and 7, 1977 (A. 10). The following special question was submitted to the jury upon agreement of counsel, "Did Rose Black, on July 14, 1976, at the time when she signed the three deeds in controversy in this case have sufficient mental capacity to fairly understand the nature and consequences of her actions?" The jury's answer was "yes", whereupon judgment was entered for defendant Samuel (A. 10).

The Supreme Judicial Court took jurisdiction of the case and affirmed the judgment for Samuel, further elaborating in a rescript opinion dated December 1, 1978 (A. 11).

Rose Black's daughter, Marion Kaplan, beneficiary under Rose's will, part of whose bequest was adeemed by the deeding of property from Rose to Samuel, subsequently filed suit in the Superior Court of Middlesex County alleging a breach of advantageous relationship due to an alleged fraud and undue influence exercised over Rose by Samuel (A. 8). Samuel filed a motion to dismiss based upon the doctrines of res judicata and collateral estoppel. Said motion to dismiss was allowed by the

court and the complaint was dismissed based on these grounds (A. 11-14). Marion appealed the allowance of said motion to the Massachusetts Appeals Court and the Supreme Judicial Court of the Commonwealth of Massachusetts. The judgment of the superior court was affirmed in both cases (A. 15-17).

Marion thereupon brought the present action in the United States District Court for the District of Massachusetts alleging the very same breach of an advantageous and contractual relationship between Rose and Marion by Samuel and further alleging a denial of rights under the Fifth and Fourteenth Amendments of the United States Constitution due to the decisions adverse to Marion's position. Samuel filed another motion to dismiss which was allowed by United States District Court Justice John J. McNaught (A. 1-4). Marion claimed an appeal in which Judge McNaught's opinion was affirmed by the justices of the United States Court of Appeals for the First Circuit. Marion seeks a review on writ of certiorari which Samuel opposes.

Argument.

I. The Decision of the United States Court of Appeals for the First Circuit is Not in Conflict with the Decision of Another Federal Court of Appeals on the Issues of Res Judicata and Failure to Assert Constitutional Rights.

Rule 17 (1) (a) of the Supreme Court Rules of Procedure states that a review on writ of certiorari will be granted when a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter. Petitioner Marion Kaplan relies on this consideration in an attempt to have the decision of the United States

Court of Appeals for the First Circuit reviewed by this Honorable Court. The First Circuit Court cited the case of *Lovely* v. *Laliberte*, 498 F.2d 1261, 1263 (1st Cir.), cert. denied, 419 U.S. 1038 (1974) for the proposition that "a litigant who could have raised a relevant federal constitutional claim in a state court proceeding he brought is barred by the doctrine of res judicata from later doing so in a separate proceeding filed for the purpose in federal court." (A. 7.) The First Circuit Court goes on to say that, if Marion had believed that Middlesex Superior Court Judge Hiller Zobel's ruling (A. 8) had been unconstitutional, this assertion could have been made to Judge Zobel, the Massachusetts Appeals Court or Supreme Judicial Court of the Commonwealth of Massachusetts. At no time was this done by Marion. An examination of the cases cited by Marion that are allegedly at odds with this First Circuit Court decision indicate that they are in accord rather than in conflict with the case of *Lovely* v. *Laliberte*, *supra*.

None of the three cases cited by Marion as contrary to *Lovely* v. *Laliberte*, *supra*, *Friarton Estates* v. *City of New York*, 525 F. Supp. 1250 (D.N.Y. 1981), *Ross* v. *International Brotherhood of Electrical Workers*, 634 F.2d 453 (9th Cir. 1980), and *Tomanio* v. *Board of Regents*, 446 U.S. 478 (1980), is at all in point with the case at bar either on the law or the facts, nor is any contrary to the *Lovely* holding. The *Tomanio* footnote to the *Lombard* case deals with a true civil rights plaintiff rather than a frustrated beneficiary seeking yet another forum to have her adeemed bequest restored. Furthermore, Marion's interpretation of the holding of *Friarton Estates*, *supra*, says that the court "has ruled that prior state court proceedings cannot bar federal court consideration on matters which were not actually litigated and determined in the state action" (Pet. Br. 12). The crux of this entire litigation from the view of respondent Samuel W. Black and the point with which the Massachusetts Supreme Judicial Court has agreed on two occasions,

the Appeals Court of Massachusetts has agreed, the Middlesex Superior Court of Massachusetts has twice agreed, the United States District Court for the District of Massachusetts has agreed, and the United States Court of Appeals for the First Circuit has agreed, is that Marion has already had her case litigated and determined or had the opportunity to have her cause of action litigated and failed to do so.

The First Circuit Court in its opinion states at A. 7 that:

> [a]ppellant [Marion] concedes that she could not pursue the present federal action if it were merely a repeat performance . . . of the prior state case. She recognizes that a disappointed state litigant may not start all over again in the federal court with the same claim brought in the state court.

Yet this is precisely what Marion has sought to do in the federal court system. She alleges a deprivation of her rights by the judicial system on the very same facts with the very same parties as in the state court action. All Marion does is give the cause of action another name and allege constitutional deprivations which have no basis in law or fact in the attempt to have any federal court rule on its merits. These merits were originally ruled on by the superior court in Massachusetts in *Black* v. *Black*, 376 Mass. 929, 381 N.E.2d 1304 (1978), and any alleged constitutional deprivation could most certainly have been raised in the Massachusetts appellate court system; none was. However, as will next be discussed, the merits of Marion's case dictate that the issue of timely raising of constitutional issues need not even be reached.

II. Marion Kaplan was in Privity with Rose Black in the Action of *Black* v. *Black*.

As indicated in Judge Zobel's opinion (A. 8-14), Marion was in privity with Rose Black in that Marion was the proposed beneficiary, pursuant to Rose's will, of the three parcels of real estate in issue in this case. When Rose conveyed these properties to Samuel and then brought suit to attempt to rescind the conveyance in *Black* v. *Black*, *supra*, Marion was clearly an unnamed plaintiff in the action. "A would-be beneficiary stands, as against a proprietary usurper, in the shoes of the testator" (A. 12), appropriately stated Judge Zobel. As a matter of law, Marion was, therefore, in privity with her mother in the action of *Black* v. *Black*, *supra*. To allow Marion to have the opportunity for a full evidentiary hearing on these same facts would enable in every instance not only the donor of property who changed his/her mind to get a full trial as to the circumstances of the transfer, but also allow the original proposed beneficiary to relitigate the very same facts with the very same interests involved under the guise of another cause of action such as an alleged breach of a contractual relationship.

III. There is an Identity of Issues Between the Case at Bar and the Prior Litigation.

There is also an identity of issues in Marion's proposed action sufficient to invoke the doctrine of res judicata as stated by Judge McNaught in citing *Roy* v. *Jasper Corporation*, No. 81-1453, slip. op. at 6 (1st Cir. December 14, 1981) at A. 3:

> Claim preclusion — the doctrines of merger and bar — is applied to prevent parties from relitigating the issues arising out of the same transaction; when either party

> prevails in an action concerning a transaction, all of the plaintiff's possible rights to remedies against the defendant arising out of that transaction are extinguished.

Any question of an alleged breach of a contractual relationship was determined by the decision in *Black* v. *Black, supra.* "Under res judicata, a final judgment on the merits of an action precludes the parties *or their privies from relitigating issues that were or could have been raised in that action. . .*" *Cromwell* v. *County of Sac.*, 94 U.S. 351, 352 (1876) (emphasis added).

Marion seeks by naming her new cause of action an interference with an advantageous relationship, to maintain that this new action is totally independent of the original judgment in *Black* v. *Black, supra.* As stated by United States District Court Judge McNaught in his memorandum and order at A. 3-4:

> The claim which plaintiff [Marion] seeks to pursue here arose out of the same transaction which was the subject of the state proceedings in *Black* v. *Black, supra,* and *Kaplan* v. *Black,* [Mass. App. Ct. Adv. Sh. (1981) 1033, 421 N.E.2d 90]. The defendant in this case prevailed in those state actions. The plaintiff is now attempting, under the guise of a different claim, to accomplish that which was denied her in two state proceedings.
>
> The suit here is tailored differently since it was last presented in the state courts. It is now called a claim for *tortious interference with an advantageous business relationship,* but the claim is the same as it always was, based upon the same factual allegations, involving the same parties and the same property. The "theory of liability" is given a different label.

Marion relies heavily on the case of *Blonder-Tongue* v. *University Foundation*, 402 U.S. 313 (1970) and for the proposition that Marion never appeared in the prior action (Pet. Br. 6) and the case of *Allen* v. *McCurry*, 449 U.S. 90 (1980), for the proposition that Marion did not have a full and fair opportunity to litigate her claim in the prior action of *Black* v. *Black*, *supra*. In citing these cases, in presenting her argument (Pet. Br. 8) and even in her statement of questions presented (Pet. Br. 2) Marion states that she was not in privity with her mother in the prior litigation and, therefore, should not be estopped from litigating her claim. At no time in this petition nor on brief in any other phase of this proceeding has Marion ever cited one case for the proposition that she was not in privity with her mother in *Black* v. *Black*, *supra*. Mere recitation of the fact that Marion was not a named party to the action nor physically appeared in the action cannot alter the legal determination that Marion was in fact in privity with her mother, nor that Marion cannot assert another "theory of liability" in an attempt to get Marion another day in court to relitigate the very same issues.

IV. Petitioner Fails to Allege a Substantive Constitutional Deprivation Worthy of Review by this Honorable Court.

Judge McNaught of the United States District Court for the First Circuit said at A. 4: "The claim of deprivation of constitutional rights is hardly worthy of being noted. It has no substance, and cannot provide a basis for this court's exercise of jurisdiction."

Marion appears to suggest that, because there was a decision contrary to her position reached in every available court in the Commonwealth of Massachusetts and in the United States Dis-

trict Court and Court of Appeals, she was deprived of her constitutional rights under the Fifth and Fourteenth Amendments. This argument is specious, to be kind. If Marion was never allowed to reach the merits of her purported cause of action in this matter, it is merely because each and every court having heard and reviewed this matter has properly applied the state of the law in its jurisdiction to the case at bar. Marion has had the opportunity to assert her rights to the fullest extent through a vast number of dilatory appeals, a course of action which has been to the long-standing economic detriment of Samuel, who was deeded the property on July 14, 1976, and had a decision rendered in his favor in *Black* v. *Black*, *supra*, over five years ago, on October 7, 1977.

Conclusion.

It is respectfully submitted to this Honorable Court that, pursuant to the character of reasons listed in the Supreme Court Rules of Procedure, Rule 17, there is no decision in the prior proceedings in this case which has been rendered in conflict with any federal court of appeals decision on the same matter, nor is there a special and important reason for reviewing this matter pursuant to this Honorable Court's judicial discretion.

The respondent, Samuel W. Black, respectfully requests that this Honorable Court deny petitioner's petition for a review on writ of certiorari, thus affirming the decision of the United States Court of Appeals for the First Circuit which affirmed the decision of the United States District Court in

allowing Samuel W. Black's motion to dismiss the complaint of Marion Kaplan.

Respectfully submitted,

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